



**Children, Families, Health, and Human Services Interim  
Committee**

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**66th Montana Legislature**

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SUE O'CONNELL, Research Analyst  
ALEXIS SANDRU, Staff Attorney  
FONG HOM, Secretary

August 13, 2020

RE: Poll of the Legislature pursuant to section 2-4-403, MCA

Dear Member of the Montana Legislature:

I am writing to you as chair of the Children, Families, Health, and Human Services Interim Committee (CFHHS). Because of the circumstances explained below, CFHHS is required by the Montana Administrative Procedure Act (Title 2, chapter 4, MCA) to poll all the members of the Legislature to determine whether the Department of Public Health and Human Services' (Department) new administrative rules proposed in Montana Administrative Register (MAR) Notice No. 37-923, pertaining to flavored electronic smoking devices, are consistent with the intent of the Legislature.

**Action Item: Returning Enclosed Ballot**

The enclosed materials include a ballot for you to indicate whether you believe the rules are consistent with or contrary to legislative intent.

**THE BALLOT THAT IS ATTACHED TO THESE MATERIALS MUST BE  
POSTMARKED ON OR BEFORE SEPTEMBER 8, 2020.**

**Poll Request Statute, Legislator Objections, and Department's Response**

When the Legislature is not in session, 2-4-403, MCA, requires the interim committee that has subject matter jurisdiction over an agency to conduct a poll of the members of the Legislature when 20 or more legislators object to a proposed administrative rule (rule). The full text of 2-4-403, MCA, provides:

**2-4-403. Legislative intent -- poll.** (1) If the legislature is not in session, the committee may poll all members of the legislature by mail to determine whether a proposed rule is consistent with the intent of the legislature.

(2) If 20 or more legislators object to a proposed rule, the committee shall poll the members of the legislature.

(3) The poll must include an opportunity for the agency to present a written justification for the proposed rule to the members of the legislature.

As of July 27, 2020, the Legislative Services Division had received 20 written objections to the Department's three new rules proposed in MAR Notice No. 37-923, which fall under the jurisdiction of CFHHS. Nineteen of the twenty objection letters<sup>1</sup> appear to be identical and state the following:

*"This letter is to register my objection to certain administrative rules proposed by the Department of Public Health and Human Services on June 16, 2020 that would prohibit the sale, offer for sale, giving, marketing, advertising, or distribution of flavored electronic smoking devices to all persons within Montana.*

*It is my intent that this objection be considered submitted in order to fulfill the requirements of 2-4-403, MCA, that states: '2-4-403(2) If 20 or more legislators object to a proposed rule, the committee shall poll the members of the legislature.'*

*I specifically object to the following rules: MAR Notice No. 37-923, New Rule I, New Rule II and New Rule III.*

*On July 2, 2020, the Economic Affairs Interim Committee formally objected to the above stated rules. Unfortunately, public reports indicate that the Department of Public Health and Human Services (DPHHS) has chosen to disregard the effect of the EAIC formal objection and intends to proceed with the rulemaking process with no intent to respond to EAIC. The wanton disregard by DPHHS for legislative will is unconscionable. Further, the Department has not formally presented its proposed rules to the Children, Families, Health and Human Services Interim Committee. While there was some reference to the proposed rules at the last meeting of the CFHHS Interim Committee, the proposed rules were not officially noticed on the agenda and the public was not afforded the opportunity of notice and comment. Unfortunately, the Department seems intent on adopting the proposed rules prior to your next meeting in late August.*

*I agree with the bipartisan majority of the Economic Affairs Interim Committee: 'The EAIC maintains that DPHHS's notice was not adopted in substantial compliance with 2-4-305(3) and (5) because there is no statute that clearly and specifically provides authority for DPHHS's wholesale prohibition on all flavored electronic smoking devices; therefore, the proposed rule is not within the scope of authority that is statutorily allowed.'<sup>2</sup>*

*I respectfully request that the Children, Families, Health and Human Services Interim Committee formally poll the entire legislature as to the intent of the proposed rules upon receipt of objections from no less than 20 legislators."*

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<sup>1</sup>Rep. David Bedey's letter differs in part from the other letters; however, the rules Rep. Bedey objected to are the same as the rules objected to in the above quotation.

<sup>2</sup>See EAIC letter to Director Sheila Hogan dated July 2, 2020, formally objecting to the proposed rules in MAR Notice No. 37-923.

Pursuant to 2-4-403(3), MCA, the Department's written justification for the proposed new rules is attached to this mailing.

### **Potential Impact of Poll**

If a majority of the members of both houses vote that a proposed rule is contrary to the intent of the Legislature, then under 2-4-404, MCA, that rule is conclusively presumed, in any litigation involving the rule, to be contrary to the intent of the Legislature. The full text of 2-4-404, MCA, provides as follows:

**2-4-404. Evidentiary value of legislative poll.** If the appropriate administrative rule review committee has conducted a poll of the legislature in accordance with 2-4-403, the results of the poll must be admissible in any court proceeding involving the validity of the proposed rule or the validity of the adopted rule if the rule was adopted by the agency. If the poll determines that a majority of the members of both houses find that the proposed rule or adopted rule is contrary to the intent of the legislature, the proposed rule or adopted rule must be conclusively presumed to be contrary to the legislative intent in any court proceeding involving its validity.

### **Publication of the Vote Results by the Secretary of State**

This poll and the poll results are a public record. Additionally, pursuant to 2-4-306(3), MCA, the results of the poll must be published with a rule if the rule is adopted.

### **History of the Proposed Rules**

On June 26, 2020, the Department proposed MAR Notice No. 37-923, which was published in Issue 12 of the Montana Administrative Register. MAR Notice No. 37-923 proposed three new rules that would prohibit a person from selling, offering for sale, giving, marketing, advertising, or otherwise distributing flavored electronic smoking devices to persons in Montana. The proposed rules also would prohibit transporting within Montana flavored electronic smoking devices intended for sale or distribution in the state. The proposed rules do not apply to a "marijuana infused product" under 50-46-302, MCA.

The Department noted in the statement of reasonable necessity for the proposed rules that it is exercising its authority under 50-1-202, MCA, to adopt and enforce rules regarding conditions of public health importance and that the rules are being proposed in response to the epidemic of youth e-cigarette or electronic smoking device use. Section 50-1-202(1)(p)(i), MCA, provides:

**50-1-202. General powers and duties.** (1) In order to carry out the purposes of the public health system to protect and promote the public health, the department, in collaboration with federal, state, and local partners, shall: [. . .]  
(p) adopt and enforce rules regarding:  
(i) the reporting and control of communicable diseases and other conditions of public health importance[.]

A condition of public health importance "means a disease, injury, or other condition that is identifiable on an individual or community level and that can reasonably be expected to lead to adverse health effects in the community." (50-1-101(2), MCA.)

**Poll Materials Enclosed**

The following materials are enclosed in this mailing to assist you in making your determination of whether the proposed new rules are consistent with or contrary to the intent of the Legislature and to cast your ballot:

BALLOT	The ballot on which you indicate whether you believe the proposed rulemaking is consistent with or contrary to the intent of the Legislature
ATTACHMENT A	The text of MAR Notice No. 37-923
ATTACHMENT B	Section 50-1-202, MCA, which is the statute implemented by the proposed rulemaking and cited as authority for the proposed rulemaking
ATTACHMENT C	The Department's written justification for the proposed rulemaking

**Additional Poll Materials Available by Request or Online**

Additional poll materials are available in hard copy format by contacting the Legislative Services Division and are posted in the "Committee Topics" section of the CFHHS website, under the hyperlink "administrative rule review", available at:  
<https://leg.mt.gov/committees/interim/2020cfhhs/agency-oversight/administrative-rule-review/>

The additional materials are as follows:

1. Legislator objection letters
2. Notification to Department of pending poll and Department response
3. EAIC objection and Department response

**Ballot Explanation -- Instructions**

State law concerning legislative polls does not provide a mechanism for legislators casting their ballots to object to anything but a "rule". Therefore, if you object to any portion of the proposed new rules in MAR Notice No. 37-923, your objection must be made to the entire proposed rulemaking. Please read the enclosed material, mark your ballot to show whether you believe the rulemaking proposed in MAR Notice No. 37-923 is consistent with or contrary to the intent of the Legislature, sign your ballot, and mail the ballot as soon as possible to the Legislative Services Division in the envelope provided.

Written notice of the results of the poll will be communicated to all members of the Legislature through the CFHHS administrative rules web page and through the blog for all interim committees, <https://leg.mt.gov/news/>.

Sincerely,

Representative Frederick (Eric) Moore  
Chair of the Children, Families, Health, and Human Services Interim Committee

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